

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JERMAINE JAMAICA CAMPBELL, SR.,
Petitioner,
v.
WARDEN RUSSELL, *et al.*,
Respondents.

Case No. 3:19-cv-00576-MMD-WGC
ORDER

I. SUMMARY

This action is a petition for a writ of habeas corpus by Petitioner Jermaine Jamaica Campbell, Sr., who is incarcerated at Ely State Prison in Ely, Nevada. Campbell is represented by appointed counsel. Respondents have filed a motion to dismiss. (ECF No. 42 (“Motion”).) For the reasons stated below, the Court will deny the Motion.

II. BACKGROUND

Campbell was convicted, following a two-day jury trial, in Nevada’s Second Judicial District Court (Washoe County), of two counts of trafficking in a controlled substance. (ECF Nos. 46-2, 46-3, 45-6, 46-7.) The Judgment was filed on February 27, 2012. (ECF No. 46-9.)

Campbell appealed. (ECF Nos. 46-10, 47-29, 47-34.) The Nevada Supreme Court affirmed on September 18, 2013. (ECF No. 47-36.) Campbell filed a petition for certiorari with the United States Supreme Court. (ECF No. 47-50.) The United States Supreme Court denied the petition for certiorari on April 28, 2014 (ECF No. 47-51) and then denied the rehearing on June 30, 2014 (ECF No. 47-52).

On October 10, 2014, Campbell filed a *pro se* petition for writ of habeas corpus in the state district court. (ECF No. 48-1.) On March 25, 2016, with appointed counsel,

1 Campbell filed a supplemental habeas petition. (ECF No. 49-14.) The state district court
2 held an evidentiary hearing. (ECF No. 50-1.) The state district court denied Campbell's
3 petition in a written order filed February 15, 2018. (ECF No. 50-6.) Campbell appealed.
4 (ECF Nos. 50-2, 51-7.) The Nevada Supreme Court affirmed on July 10, 2019. (ECF No.
5 51-12.) The remittitur was issued on August 5, 2019. (ECF No. 51-14.)

6 On September 15, 2020, Campbell filed a *pro se* Motion for Modification of
7 Sentence in the state district court. (ECF No. 51-15.) The state district court denied that
8 motion on October 16, 2020. (ECF No. 51-21). Campbell appealed (ECF No. 51-24), but
9 the Nevada Supreme Court dismissed the appeal on January 8, 2021, ruling that the
10 notice of appeal was untimely filed. (ECF No. 51-25.)

11 This Court received a *pro se* petition for writ of habeas corpus from Campbell (ECF
12 No. 4), initiating this action, on September 17, 2019. On September 18, 2019, the Court
13 granted Campbell's motion for appointment of counsel (ECF No. 5) and appointed the
14 Federal Public Defender for the District of Nevada to represent him. (ECF No. 3.) With
15 counsel, on September 21, 2020, Campbell filed a first amended petition for writ of habeas
16 corpus. (ECF No. 25.) Campbell's first amended petition, now his operative petition,
17 includes the following claims of ineffective assistance of his trial counsel (stated and
18 organized here as in the petition):

19 Ground 1: Campbell's federal constitutional rights were violated on account
20 of ineffective assistance of his trial counsel because "counsel induced
21 Campbell to reject a favorable plea based upon counsel's opinion that the
22 case would be dismissed for the State's failure to locate Ashley Loftis."

23 Ground 2: Campbell's federal constitutional rights were violated on account
24 of ineffective assistance of his trial counsel because counsel "fail[ed] to
25 argue that Ms. Loftis did not voluntarily consent to sign the waiver that
26 permitted the search of the apartment."

27 Ground 3: Campbell's federal constitutional rights were violated on account
28 of ineffective assistance of his trial counsel because counsel "failed to make
an *Apprendi* objection to the enhanced sentence beyond the one justified
by the jury's verdict."

Ground 4: Campbell's federal constitutional rights were violated on account
of ineffective assistance of his trial counsel because counsel was ineffective
at sentencing.

Ground 4A: "Counsel was ineffective at sentencing by failing to make any argument on behalf of Mr. Campbell."

Ground 4B: "Counsel was ineffective at sentencing by failing to object to suspect evidence cited by the judge in imposing two life sentences."

(ECF No. 25.)

Respondents filed their Motion on April 9, 2021 (ECF No. 42), contending that all of Campbell's claims are barred by the statute of limitations, that Ground 1 is unexhausted in state court, and that Grounds 3, 4A, and 4B are unexhausted in state court and/or procedurally defaulted. Campbell has filed an opposition to the Motion (ECF No. 58), and Respondents have replied (ECF No. 62).

III. DISCUSSION

A. The Statute of Limitations – Application in this Case

The Antiterrorism and Effective Death Penalty Act (AEDPA), enacted in 1996, established a one-year statute of limitations for federal habeas petitions filed by prisoners challenging state convictions or sentences. The statute provides:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

1 28 U.S.C. § 2244(d)(1). The AEDPA statute of limitations is tolled during the time that a
2 properly filed application for state post-conviction or other collateral review is pending in
3 state court. See 28 U.S.C. § 2244(d)(2).

4 Campbell's conviction became final on June 30, 2014, when the United States
5 Supreme Court denied rehearing after denying his petition for certiorari. (ECF Nos. 47-
6 51, 47-52.) Campbell filed his state habeas petition on October 10, 2014, tolling the
7 limitations period under 28 U.S.C. § 2244(d)(2). (ECF No. 48-1.) One hundred and two
8 days ran against the limitations period before that statutory tolling began. The limitations
9 period remained tolled, by virtue of Campbell's state habeas action, until August 5, 2019,
10 when the Nevada Supreme Court's remittitur issued following its affirmance of the denial
11 of Campbell's state habeas petition. (ECF No. 51-14.) The remaining 263 days of the
12 limitations period ran out, and the limitations period expired, on April 24, 2020.

13 Campbell's original *pro se* habeas petition in this case (ECF No. 4), received by
14 the Court on September 17, 2019, was filed well within the limitations period. However,
15 his counseled first amended petition (ECF No. 25), filed on September 21, 2020, was filed
16 well after the expiration of the limitations period. This much is undisputed. (ECF Nos. 42
17 at 7, 58 at 2.)

18 The parties' disputes regarding the operation of the statute of limitations involve
19 the question of whether the claims in Campbell's first amended petition relate back to the
20 claims in his original petition. In *Mayle v. Felix*, the Supreme Court held that "[s]o long as
21 the original and amended petitions state claims that are tied to a common core of
22 operative facts, relation back will be in order," but "[a]n amended habeas petition . . . does
23 not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new
24 ground for relief supported by facts that differ in both time and type from those the original
25 pleading set forth." 545 U.S. 664, 650, 664 (2005).

26 **B. Exhaustion of State Court Remedies – Legal Standards**

27 A federal court may not grant relief on a habeas corpus claim not exhausted in
28 state court. See 28 U.S.C. § 2254(b). The exhaustion doctrine is based on the policy of

1 federal-state comity, and is designed to give state courts the initial opportunity to correct
2 alleged constitutional deprivations. See *Picard v. Conner*, 404 U.S. 270, 275 (1971). To
3 exhaust a claim, a petitioner must fairly present that claim to the state's highest court and
4 must give that court the opportunity to address and resolve it. See *Duncan v. Henry*, 513
5 U.S. 364, 365 (1995) (per curiam); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992). The
6 "fair presentation" requirement is satisfied when the claim has been presented to the
7 highest state court by describing the operative facts and the legal theory upon which the
8 federal claim is based. See *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Batchelor v. Cupp*,
9 693 F.2d 859, 862 (9th Cir.1982), *cert. denied*, 463 U.S. 1212 (1983). To fairly present a
10 federal constitutional claim to the state court, the petitioner must alert the court to the fact
11 that he asserts a claim under the United States Constitution. See *Hiivala v. Wood*, 195
12 F.3d 1098, 1106 (9th Cir.1999), *cert. denied*, 529 U.S. 1009 (2000) (citing *Duncan*, 513
13 U.S. at 365-66).

14 **C. Procedural Default – Legal Standards**

15 In *Coleman v. Thompson*, the Supreme Court held that a state prisoner who fails
16 to comply with the state's procedural requirements in presenting his claims is barred by
17 the adequate and independent state ground doctrine from obtaining a writ of habeas
18 corpus in federal court. See 501 U.S. 722, 731-32 (1991) ("Just as in those cases in which
19 a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to
20 meet the state's procedural requirements for presenting his federal claims has deprived
21 the state courts of an opportunity to address those claims in the first instance."). Where
22 such a procedural default constitutes an adequate and independent state ground for
23 denial of habeas corpus, the default may be excused only if "a constitutional violation has
24 probably resulted in the conviction of one who is actually innocent," or if the prisoner
25 demonstrates cause for the default and prejudice resulting from it. *Murray v. Carrier*, 477
26 U.S. 478, 496 (1986).

27 To demonstrate cause for a procedural default, the petitioner must "show that
28 some objective factor external to the defense impeded" his efforts to comply with the state

1 procedural rule. *Id.* at 488. For cause to exist, the external impediment must have
 2 prevented the petitioner from raising the claim. See *McCleskey v. Zant*, 499 U.S. 467,
 3 497 (1991). With respect to the prejudice prong, the petitioner bears “the burden of
 4 showing not merely that the errors [complained of] constituted a possibility of prejudice,
 5 but that they worked to his actual and substantial disadvantage, infecting his entire
 6 [proceeding] with errors of constitutional dimension.” *White v. Lewis*, 874 F.2d 599, 603
 7 (9th Cir. 1989) (citing *United States v. Frady*, 456 U.S. 152, 170 (1982)).

8 In *Martinez v. Ryan*, the Supreme Court ruled that ineffective assistance of post-
 9 conviction counsel may serve as cause, to overcome the procedural default of a claim of
 10 ineffective assistance of trial counsel. See 566 U.S. 1, 9 (2012). In *Martinez*, the Supreme
 11 Court noted that it had previously held, in *Coleman*, that “an attorney’s negligence in a
 12 postconviction proceeding does not establish cause” to excuse a procedural default. *Id.*
 13 at 15 (citing *Coleman*, 501 U.S. at 746-47). The Court in *Martinez*, however, “qualif[ied]
 14 *Coleman* by recognizing a narrow exception: inadequate assistance of counsel at initial-
 15 review collateral proceedings may establish cause for a prisoner’s procedural default of
 16 a claim of ineffective assistance at trial.” 566 U.S. at 9. The Court described “initial-review
 17 collateral proceedings” as “collateral proceedings which provide the first occasion to raise
 18 a claim of ineffective assistance at trial.” *Id.* at 8.

19 **D. Claim-Specific Analysis**

20 **1. Ground 1**

21 In Ground 1, Campbell claims that his federal constitutional rights were violated on
 22 account of ineffective assistance of his trial counsel because “counsel induced Campbell
 23 to reject a favorable plea based upon counsel’s opinion that the case would be dismissed
 24 for the state’s failure to locate Ashley Loftis.” (ECF No. 25 at 6.)

25 The statute of limitations issue with respect to Ground 1 boils down to whether the
 26 claim in Ground 1 of Campbell’s amended petition relates back to the claim in Ground 9
 27 of his original petition. (ECF Nos. 25 at 6-10, 4 at 51-57.) The core operative facts of
 28 Ground 1 are as follows:

1 Mr. Campbell was represented by John Ohlson at trial. The month before
2 the trial was set to [begin], the prosecution sent an email to Ohlson with an
3 offer of 6 to 15 years with no habitual criminal designation. Rather than take
4 this favorable deal, Ohlson advised Mr. Campbell to reject it, suggesting
5 instead that Mr. Campbell proceed to trial because the State could not find
6 Ms. Loftis and that if the State could not locate her the court would likely
7 dismiss the charges. Mr. Campbell declined the State's offer and chose to
8 go to trial based on this advice.

9 (ECF No. 25 at 7.) The Court finds that Ground 9 of Campbell's original *pro se* habeas
10 petition was tied to the same core operative facts. (ECF No. 4 at 51-52.) Ground 1 relates
11 back to Ground 9 of the timely-filed original petition and is not barred by the statute of
12 limitations.

13 Turning to the question of exhaustion of state-court remedies with respect to
14 Ground 1, Campbell did raise this claim in the state district court in Ground 9 of his state
15 habeas petition. (ECF No. 49-14 at 10-11.) The state district court denied relief on the
16 claim, based primarily upon the testimony of Campbell's trial counsel at the evidentiary
17 hearing. (ECF No. 50-6 at 10-11.) Then, on the appeal in that action, Campbell added to
18 the claim somewhat—arguing that counsel was ineffective for failing to explain “joint or
19 constructive possession liability” to Campbell—but he still asserted factual allegations and
20 argument sufficient to raise on appeal the claim as it was raised in the district court and
21 as it is raised here in Ground 1. (ECF No. 51-7 at 17-18, 22-23, 48-51.) The Nevada
22 Supreme Court affirmed the denial of relief, including the following in its order:

23 We conclude that substantial evidence supports the district court's
24 conclusion that appellant failed to demonstrate that counsel convinced him
25 to reject the plea offer.

26 Counsel did not tell appellant to reject the plea offer. To the extent that
27 appellant's testimony contradicted that of his counsel, it was for the district
28 court to assess the relative credibility of each witness, and that
determination receives substantial deference on appeal. *See Bolden v.*
State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

(ECF No. 51-12 at 3-4.) The Court finds that Campbell exhausted the claim in Ground 1
on the appeal in his state habeas action.

///

///

1 2. Ground 2

2 In Ground 2, Campbell claims that his federal constitutional rights were violated on
3 account of ineffective assistance of his trial counsel because counsel “fail[ed] to argue
4 that Ms. Loftis did not voluntarily consent to sign the waiver that permitted the search of
5 the apartment.” (ECF No. 25 at 10.)

6 The core operative facts of Ground 2 are the allegations that the police relied upon
7 a consent form with Loftis’ signature on it to search the apartment shared by Campbell
8 and Loftis; however, Loftis could not have voluntarily consented to the search because
9 she was, at the time, detoxing from heroin and taking drugs to treat the symptoms of her
10 withdrawal. (*Id.* at 10-13.) The Court finds that Ground 7 of Campbell’s *pro se* original
11 petition is tied to the same core operative facts. (ECF No. 4 at 40-41.) While Ground 7 of
12 the original petition includes another theory—that Loftis did not herself sign the consent
13 form—it includes the theory that Loftis was under the influence of drugs and “could not
14 have been in the right state of mind to have signed the consent form she allegedly
15 sign[ed].” (*Id.* at 41.) Moreover, “[a report of a registered nurse in Loftis’ medical records]
16 could have proven Loftis could not have signed the consent form voluntarily in the state
17 of mind she was in.” (*Id.* at 40.) Ground 2 relates back to Ground 7 of the timely-filed
18 original petition and is not barred by the statute of limitations.

19 Respondents do not contend that Ground 2 is unexhausted in state court or
20 procedurally defaulted.

21 3. Ground 3

22 In Ground 3, Campbell claims that his federal constitutional rights were violated on
23 account of ineffective assistance of his trial counsel because counsel “failed to make an
24 *Apprendi* objection to the enhanced sentence beyond the one justified by the jury’s
25 verdict.” (ECF No. 25 at 13.)

26 The core operative facts underlying this claim are that the jury instructions required
27 a finding of only four or more grams of controlled substance, whereas the subsection of
28 the statute under which Campbell was ultimately convicted and sentenced required a

1 finding of 28 or more grams, but Campbell's trial counsel failed to make an objection
2 under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). (*Id.* at 13-18.) A close look at
3 Campbell's *pro se* original petition reveals that he drafted the petition in part by including,
4 within the petition itself, briefing excerpted from his counseled opening brief on the appeal
5 in his state habeas action. (ECF Nos. 4 at 95-145, 51-7 at 10-59.) That briefing was
6 inserted in the petition immediately following a form page like the one he used before
7 each of his claims to show the exhaustion in state court of the claim, indicating that he
8 meant that briefing to constitute claims in his petition. (ECF No. 4 at 95.) Also, that briefing
9 was inserted in the petition before the signature page, further indicating that it was meant
10 as part of the petition itself. (*Id.* at 171.) Construing Campbell's *pro se* original petition
11 liberally, the Court determines that Campbell intended the material in the briefing
12 excerpted from his state appellate brief and inserted into his petition to be part of the
13 petition itself, rather than an attachment or exhibit in support of the petition. See *Ross v.*
14 *Williams*, 950 F.3d 1160, 1173 n.19 (9th Cir. 2020) (en banc). And, within that part of
15 Campbell's *pro se* original petition is a claim sharing core operative facts with the claim
16 in Ground 3. (ECF No. 4 at 138-43.) The Court finds, therefore, that the claim in Ground
17 3 relates back to the timely-filed original petition and is not barred by the statute of
18 limitations.

19 Regarding the question of exhaustion of state-court remedies, Campbell did not
20 assert this claim in his petition, or in his supplement to the petition, in his state habeas
21 action. (ECF Nos. 48-1, 49-14.) After appointment of different counsel for the appeal in
22 that action, however, Campbell did assert this claim on the appeal. (ECF No. 51-7 at 52-
23 57.) Indeed, as is explained above, Campbell included the claim in his *pro se* original
24 petition in this case by inserting pages from his counseled opening brief on the appeal in
25 his state habeas action. (ECF No. 4 at 138-43.) Because Campbell presented this claim
26 to the Nevada Supreme Court, it is exhausted in state court.

27 However, because Campbell had not raised the claim in his state habeas petition,
28 the Nevada Supreme Court declined to consider the claim on appeal, ruling as follows:

1 Lastly, appellant argues that trial and appellate counsel were ineffective as
 2 to the sentencing hearing and not challenging the sentence on appeal
 3 based on inadequate jury instruction. Appellant did not raise this claim in
 his petition and we decline to consider it for the first time on appeal. See
McNelson v. State, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

4 (ECF No. 51-12 at 4.) The Nevada Supreme Court applied a state law procedural bar to
 5 the claim. Therefore, the claim is subject to application of the procedural default doctrine
 6 in this case. But as this is a claim of ineffective assistance of trial counsel, Campbell might
 7 be able to overcome the procedural default, under *Martinez*, by showing ineffective
 8 assistance of counsel before the state district court in his state habeas action. See 566
 9 U.S. at 9. That analysis, however, is intertwined with the merits of the claim, such that it
 10 will be better addressed in conjunction with the merits of the claim, after Respondents file
 11 an answer and Campbell files a reply. The Court, then, will deny Respondents' motion to
 12 dismiss this claim on procedural default grounds, without prejudice to them asserting the
 13 procedural default defense to the claim in their answer.

14 4. Ground 4A

15 In Ground 4A, Campbell claims that his federal constitutional rights were violated
 16 on account of ineffective assistance of his trial counsel because his counsel was
 17 ineffective at sentencing for "failing to make any argument on behalf of Mr. Campbell."
 18 (ECF No. 25 at 18.)

19 In his *pro se* original petition, within the briefing excerpted from the opening brief
 20 on the appeal in his state habeas action, Campbell asserted a claim sharing core
 21 operative facts with the claim in Ground 4A. (ECF No. 4 at 110-12, 120-29.) Ground 4A
 22 relates back to the timely-filed original petition and is not barred by the statute of
 23 limitations.

24 With respect to the issues of exhaustion and procedural default, the procedural
 25 history of this claim is like that of Ground 3. Campbell did not assert this claim in his
 26 petition, or in his supplement to the petition, in his state habeas action. (ECF Nos. 48-1,
 27 49-14.) On the appeal in that action, Campbell did assert this claim. (ECF No. 51-7 at 24-
 28 26, 34-43.) However, because Campbell had not raised the claim in his state habeas

1 petition, the Nevada Supreme Court declined to consider the claim, and ruled it
2 procedurally barred. (ECF No. 51-12 at 4.) Therefore, the claim is subject to application
3 of the procedural default doctrine in this case, but because this is a claim of ineffective
4 assistance of trial counsel, Campbell might be able to overcome the procedural default,
5 under *Martinez*, by showing ineffective assistance of counsel before the state district court
6 in his state habeas action. See 566 U.S. at 9. That analysis, however, is intertwined with
7 the merits of the claim, such that it will be better addressed in conjunction with the merits
8 of the claim, after Respondents file an answer and Campbell files a reply. The Court, then,
9 will deny Respondents' motion to dismiss this claim on procedural default grounds,
10 without prejudice to them asserting the procedural default defense to the claim in their
11 answer.

12 5. Ground 4B

13 In Ground 4B, Campbell claims that his federal constitutional rights were violated
14 on account of ineffective assistance of his trial counsel because counsel was ineffective
15 at sentencing for "failing to object to suspect evidence cited by the judge in imposing two
16 life sentences." (ECF No. 25 at 19.)

17 Here again, in his *pro se* original petition, within the briefing excerpted from the
18 opening brief on the appeal in his state habeas action, Campbell asserted a claim sharing
19 core operative facts with the claim in Ground 4B. (ECF No. 4 at 120-29.) Ground 4B
20 relates back to the timely-filed original petition and is not barred by the statute of
21 limitations.

22 With respect to the questions of exhaustion and procedural default, this claim has
23 a procedural history like that of Grounds 3 and 4A. Campbell did not assert this claim in
24 his petition, or in his supplement to the petition, in his state habeas action. (ECF Nos. 48-
25 1, 49-14.) On the appeal in that action, Campbell did assert this claim. (ECF No. 51-7 at
26 34-43.) However, because Campbell had not raised the claim in his state habeas petition,
27 the Nevada Supreme Court declined to consider the claim, and ruled it procedurally
28 barred. (ECF No. 51-12 at 4.) Therefore, the claim is subject to application of the

1 procedural default doctrine in this case. However, because this is a claim of ineffective
2 assistance of trial counsel, Campbell might be able to overcome the procedural default,
3 under *Martinez*, by showing ineffective assistance of counsel before the state district court
4 in his state habeas action. See 566 U.S. at 9. That analysis, however, is intertwined with
5 the merits of the claim, such that it will be better addressed in conjunction with the merits
6 of the claim, after Respondents file an answer and Campbell files a reply. The Court, then,
7 will deny Respondents' motion to dismiss this claim on procedural default grounds,
8 without prejudice to them asserting the procedural default defense to the claim in their
9 answer.

10 **IV. CONCLUSION**

11 It is therefore ordered that Respondents' Motion to Dismiss (ECF No. 42) is denied.

12 It is further ordered that Respondents will have 60 days from the date of this order
13 to file an answer. In all other respects, the schedule for further proceedings set forth in
14 the order entered October 21, 2019 (ECF No. 9), will remain in effect.

15 DATED THIS 16th Day of December 2021.



16
17
18 MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE